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Mass. Legislature Weighs Changes to Zoning Act; Quick Decision on Plaintiff's Standing is Proposed

Article By:

Construction Practice Group Pierce Atwood

Two bills pending at the **Massachusetts State House** would **amend the state Zoning Act**, known as **Chapter 40A**, which governs zoning in every Massachusetts city and town except Boston. The Zoning Act is seldom amended, even though courts and land use lawyers are well aware of its shortcomings. This is no doubt because zoning is often a hotly-contested political issue. But commonsense changes to Chapter 40A, while difficult to accomplish, can yield significant benefits for all concerned with real estate development in the Commonwealth.

Will Standing Determination be Front-loaded?

A bill introduced in the Massachusetts Senate, Senate Bill 1024 (pdf), tackles one of the most vexatious aspects of zoning for developers – the standing of abutters to sue. Standing is a prerequisite for filing a case in court; generally speaking, to have standing to sue, plaintiffs must show they're harmed or that their rights are impacted in some material way. In other contexts a defendant can quickly move to dismiss a case if the plaintiff doesn't have standing. This is not usually so in zoning cases.

Chapter 40A, section 17 says that only those "aggrieved" by a zoning decision have standing to appeal. As the Supreme Judicial Court put it in 81 Spooner Road, LLC v. Zoning Board of Appeals of Brookline (pdf), "The right or interest asserted by a plaintiff

claiming aggrievement must be one that the Zoning Act is intended to protect, either explicitly or implicitly . . . [and] aggrievement requires a showing of more than minimal or slightly appreciable harm." However, owners of land in close proximity to the proposed development are *presumed* to be aggrieved (and thus have standing) if they meet the definition of "party in interest" in Chapter 40A, Section 11. This presumption can be rebutted if the defendant presents evidence that the plaintiff is not actually aggrieved. If the presumption of aggrievement is rebutted then the plaintiff must produce evidence of actual aggrievement.

The problem in zoning cases is that determining whether the plaintiff is aggrieved usually requires an evidentiary hearing. The evidence presented may include expert testimony about issues like traffic, public safety, loss of property value, and so forth. In many cases this same evidence would also be required for the plaintiff to prove, as part of its case-in-chief, that the zoning decision at issue should be overturned. This is why standing in zoning cases is often decided at trial. In a business like real estate development, where time and money are synonymous, having to wait a year or more before getting a case dismissed because the plaintiff isn't truly harmed by a project can be both frustrating and costly.

S. 1024 addresses this problem by creating a mandatory standing review in zoning cases. First, the bill would amend Chapter 40A so that no party could join an appeal after the appeal period has expired – this would prevent a plaintiff from fishing around for a more impacted party after filing a case. Second, the bill would require plaintiffs to file affidavits establishing their aggrievement within 30 days of the filing the appeal, followed by a hearing (which can be evidentiary in nature) within 90 days. Third, the bill appears to eliminate the presumption of aggrievement for parties listed in Section 11.

S. 1024 would force the plaintiff's standing to be determined early in a zoning appeal by requiring courts to review the plaintiff's evidence of aggrievement (including expert testimony) within the first three months. Often, zoning appeals are filed by minimally- or non-impacted parties who have no expectation of winning or (sometimes) even seriously litigating the case. These cases are brought mainly to delay properly-approved developments in the hope that the developer (or financing

institution) will give up and walk away. This proposed change to Chapter 40A would require anyone impacted by a zoning decision to show *at the outset* that they are actually aggrieved and intend to pursue the case, and presumably would increase the number of early dismissals for lack of standing.

Dover Amendment Clarification, or More Confusion?

A second bill to amend the Zoning Act, House Bill No. 1765 (pdf), would implement a change sought not by developers but by municipalities and their residents. This bill concerns Chapter 40A, Section 3, often referred to as the Dover Amendment. This section of the Zoning Act limits the ability of municipalities to regulate certain uses of property through zoning. Relevant here, Section 3 broadly protects the use of land for "educational purposes."

H. 1765 would write into Chapter 40A, Section 3 the Appeals Court's holding in The Southern New England Conference Association of Seventh-Day Adventists v. Town of Burlington (pdf), that the "Legislature did not intend that § 3 of c. 40A exempt a religious use from lawful wetlands control under a local zoning by-law." That holding has been assumed to cover not only religious but also educational uses, which are listed in the same paragraph of Section 3.

Under H. 1765, Section 3 would explicitly state that "nonprofit educational corporations" are subject to local "wetlands or natural resource area protections." One problem with this language is that, while "wetlands" is a well-defined term, the broader term "natural resource area" is not. This term should be better defined before the bill is finalized to avoid introducing any more confusion into Chapter 40A.

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